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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 701

SMITH & WESSON, INC. (a Corporation), *Petitioner*

v.

HAROLD L. COSPER, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner prays that a Writ of Certiorari issue to review the judgment and decision of the Supreme Court of the State of California entered in the above entitled cause November 20, 1959, which said judgment and decision reversed the judgment of the Superior Court of the State of California in and for the County of Kern dated January 24, 1958 quashing service of summons on petitioner.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California is reported in 53 Cal. 2nd at page —, 53 Advanced Cal. Reports No. 2, 77; the opinion of the District Court of Appeal, Fourth Appellate District, State of California, is reported at 338 P. 2d 596, 170 A.C.A. 244; the opinion of the Superior Court of Kern County, California, is unreported. All of the said opinions are included in the Appendix.

JURISDICTION

The opinion of the Supreme Court of the State of California was filed and entered on November 20, 1959, by which said Court reversed the ruling of the Superior Court of Kern County, California, quashing the service of process upon the petitioner. The Superior Court of the State of California in and for the County of Kern has by its order dated January 30, 1960 granted to this petitioner an extension of time within which to appear or plead to and including March 13, 1960.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Is the decision of the Supreme Court of the State of California in conflict with the due process clause of the Fourteenth Amendment of the Constitution of the United States in that it subjects a foreign corporation to jurisdiction *in personam* on an action arising out of tort without the necessary minimum contacts of said corporation to the State, as not to violate traditional notions of fair play and substantial justice?

2. Is the decision of the Supreme Court of the State of California in conflict with the due process clause of the Fourteenth Amendment to the Constitution of the United States in its interpretation of the State of California Corporations Code Section 6500 in that it interprets "general manager within the state" to encompass service upon an employee of an independent contractor with the foreign corporation who is in fact not an agent, servant, employee, or manager, or in any wise connected with the said corporation on the sole ground that said individual's past conduct would make it likely that the foreign corporation would receive notice of such service?

3. Is a foreign corporation doing business in the State of California sufficient to make it amenable to *in personam* jurisdiction of the State of California courts where its entire activity in the State of California consists of distribution of products manufactured in Massachusetts, F.O.B. Massachusetts, pursuant to orders originating in the State of California and sales promotions on a non-exclusive basis by independent contractors called manufacturer's representatives acting without control by Smith & Wesson, Inc., on a straight commission of 5%, said corporation having no agents, employees, servants, properties, accounts of any kind in the State of California and where the manufacturer's representative buys its own samples and receives no help or assistance, direction or control by Smith & Wesson, Inc., except the furnishing of advertising brochures available to the jobbing trade throughout the world? and

4. Does the delivery of summons to an employee of an independent contractor constitute valid service upon a foreign corporation?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States, Amendment XIV:

"* * * nor shall any State deprive any person of * * * property, without due process of law * * *."

2. State of California Corporation Code, Sec. 6500:

Section 6500 of the Corporations Code of the State of California reads as follows:

"*Service upon designated agent or officer; certified copy of designation as evidence.* Delivery by hand of a copy of any process against a foreign corporation (a) to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, the general manager in this State, or if the corporation be a bank to a cashier or an assistant cashier (b) to any natural person designated by it as agent for the service of process, or (c), if the corporation has designated a corporate agent, at the office of such corporate agent in the city, town, or village named in the statement filed by the corporation pursuant to Section 6403 to any person at such office named in the certificate of such corporate agent filed pursuant to Section 3301.5 or 6403.5, if such certificate has not been superseded or otherwise to any person at such office named in the last certificate filed pursuant to Section 3301.6 or 6403.6, shall constitute valid service on the corporation.

"A copy of the designation, certified by the Secretary of State is sufficient evidence of the appointment of an agent for the service of process."

STATEMENT OF CASE

The matter arises out of a complaint filed in the Superior Court of the State of California in and for the County of Kern against Smith & Wesson Arms Co.,

a corporation (proper name Smith & Wesson, Inc.) and E. Morton Pitt. There are two causes of action, one on warranty against E. Morton Pitt which is not involved in this petition, and one alleging negligent manufacture by Smith & Wesson Arms Co. (proper name Smith & Wesson, Inc.) of a pistol and the explosion thereof on the 4th day of January, 1956, in the City of Delano, County of Kern, State of California, with injury to plaintiff. (Cl. Trs., page 2). Summons was handed to an individual named Walter K. Lookabaugh in an effort to serve Smith & Wesson Arms Co. (Smith & Wesson, Inc.) as alleged sales manager of Smith & Wesson Arms Co. for eleven western States, manufacturer's representative for Smith & Wesson Arms Co., and general manager of Smith & Wesson Arms Co. (Cl. Trs., pages 67 and 68). On June 21, 1957, special appearance by way of Motion To Quash Service was filed by Smith & Wesson, Inc., a Massachusetts corporation, supported by the affidavit of Carl R. Hellstrom, president of Smith & Wesson, Inc. (Cl. Trs., pages 15 through 18). The Motion to Quash was on two grounds:

1. That Smith & Wesson, Inc., was a foreign corporation not doing business within the State of California and immune to service of process, and

2. That there was no service under California Corporations Code, Section 6500, and that the service on Walter K. Lookabaugh was ineffective for any purpose. (Cl. Trs., pages 15 through 18).

Certain affidavits were submitted by plaintiff and depositions submitted as affidavits after being quashed as depositions due to irregularity in their being obtained which, however, established nothing more

than descriptions of the activities of Smith & Wesson, Inc., as outlined in the Affidavit of Carl R. Hellstrom. (Decision of Supreme Court of the State of California, Appendix, page 1a *et seq.*, at page 4a).

The affidavit of Carl R. Hellstrom is set forth at length as upon it the court predicates one of its important findings:

> "I, Carl R. Hellstrom, President of Smith & Wesson, Inc., on oath depose and say:
>
> "That Smith & Wesson, Inc. is a Massachusetts Corporation with its offices and manufacturing facilities in Springfield, Massachusetts.
>
> "That Smith & Wesson, Inc. is not qualified to do business in California, and has not filed an application to do business in California, and has not requested the Secretary of State, or other lawful authority, to do business in California.
>
> "That Smith & Wesson, Inc. has no agents, salesmen, or other employees residing in California, nor any resident representative authorized to adjust any claims or complaints against Smith & Wesson, Inc. in California.
>
> "That Smith & Wesson, Inc. has never had, nor does it now have offices in California, nor has it held any sales conventions in California.
>
> "That Smith & Wesson, Inc. has no property, inventory or assets in California.
>
> "That Smith & Wesson, Inc. does not solicit retail business, but distributes its products F.O.B. Springfield through regular wholesale and dealer channels. Sales promotions are principally conducted by long established firms known as manufacturer's representatives, which on their own time and expense solicit business in several allied lines against an over-riding discount, or commission, on business initiated by them.

"That the Walter Lookabaugh Co. of California and its predecessor, the Paul S. Linforth Co., have been known to us as general manufacturer's representatives specializing in the sporting goods field.

"That Smith & Wesson, Inc. has never had, nor does it now have, any contract or agreement with them except that they were, in common with their other lines, to promote on a non-exclusive bases the sale of our products on the West coast against a straight commission of 5%.

"That Smith & Wesson, Inc. does not now have, nor has it ever had, any financial interest in the Lookabaugh Co. or its predecessors, and that Smith & Wesson, Inc. does not have any control or jurisdiction of the Walter Lookabaugh Co. or its employees.

"That the Walter Lookabaugh Co. buys its own samples and that no help or assistance is given them by Smith & Wesson, Inc., except such advertising material as is furnished by Smith & Wesson, Inc. to the general jobbing trade throughout the world.

CARL R. HELLSTROM

"Then appeared personally, Carl R. Hellstrom, President of Smith & Wesson, Inc., and swore that the above recited facts are true and correct to the best of his knowledge and belief.

VERA G. ROCKSTROK

"My commission expires
Nov. 8, 1963"

On hearing the Superior Court granted the motion to quash and made the following determinations of fact:

"(1) Walter Lookabaugh is not (a) an officer of defendant Smith & Wesson, Inc., nor (b) The general

manager in this state of said defendant, nor (c) the designated agent of said defendant for service of process in California;

"(2) That defendant Smith & Wesson, Inc., is not doing business in California in the sense required to make it amendable to process there." (Cl. Tr., page 58). Appendix, page 18a *et seq.*, at pages 19a and 20a.

The decision of the Superior Court of the State of California in and for the County of Kern was affirmed by the District Court of Appeal, Fourth Appellate District, State of California, reported at 338 P. 2d 596, 170 A.C.A. 244, Appendix, page 8a *et seq.*

The Supreme Court of the State of California reversed the District Court of Appeal and set aside the findings of fact of the Superior Court and found on the basis of the affidavit of Carl R. Hellstrom that under the minimum contacts test established in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 66, S. Ct. 154, 90 L. Ed. 95, Smith & Wesson, Inc., was doing business in the State of California sufficient to make it amenable to the jurisdiction of the California courts, and that service upon Walter K. Lookabaugh was sufficient to apprise Smith & Wesson, Inc., of such service even though not an agent of Smith & Wesson, Inc.

A petition for writ of certiorari has been filed in the United States Supreme Court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Supreme Court of the State of California at page 6 of its decision in the *Cosper* v. *Smith & Wesson, Inc.* matter here presented states that the decision is in accordance with and not in conflict with *Inter-*

national Shoe Co. v. *Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, and *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2nd 223. The more recent case of *Hanson* v. *Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2nd 1283, is neither cited or discussed.

The Supreme Court of the State of California has adopted the language of *International Shoe Co.* v. *Washington* (*supra*) as a test to determine whether or not a foreign corporation is in fact doing business within the State to make it amenable to *in personam* jurisdiction, the test being that there are sufficient contacts with the state to "make it reasonable and just according to traditional concepts of fair play and substantial justice."

The same California court within a month of the decision in the *Cosper* case decided *Fisher Governor Co.* v. *Superior Court*, 53 A. C. 2nd 221, 53 Cal. 2nd —. The court stated that the same rule applied, to-wit, sufficient contacts to make it reasonable and just according to traditional concepts of fair play and substantial justice, but that factually the *Fisher Governor Co.* case did not have such minimum contacts. In ariving at this conclusion, the Supreme Court of the State of California stated and as is borne out by the record, that the facts concerning doing business were identical in the *Fisher Governor* case and the *Cosper* v. *Smith & Wesson* case, but that the *Fisher Governor Co.* case did not have minimum contacts in view of the fact that the tort occurred in Idaho, and the injured persons were non-residents of California. The Supreme Court of California has therefore established as the constitutional law under the due process clause of the United States Constitution that the minimum con-

tacts rule promulgated in the *International Shoe Co.* v. *Washington* (*supra*), applies against foreign corporations where the following minimum contacts exist:

1. A tort occurs in the State of California, and

2. The injured party is a resident of the State of California.

This interpretation of the Supreme Court of the State of California as to what factual matters comply with the doctrine of the *International Shoe Co.* case is not borne out by the language of said case. That case in 326 U.S., at page 319, in describing the requirements of due process with regard to the situation here involved, states the requirement as follows:

> "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of due process to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations."

The very recent case decided March 10, 1959, U. S. District Court, District Minnesota, Fourth Division, is directly in point and diametrically opposed to the California interpretation of the *International Shoe Co.* case and the Fourteenth Amendment to the Constitution of the United States. This case is *Mueller* v. *Steelcase, Inc.*, 172 Fed. Supp. 416. It involved the constitutionality of a Minnesota statute authorizing Minnesota courts to take jurisdiction over foreign corporations in the following situations:

> "If such foreign corporation commits a tort in whole or in part in Minnesota against a resident

> of Minnesota, such acts shall be deemed to be doing business in Minnesota by the foreign corporation and shall be deemed equivalent to the appointment by the foreign corporation of the Secretary of State of Minnesota and his successors to be its true and lawful attorney upon whom may be served all lawful process of any actions or proceedings against the foreign corporation arising from or growing out of such contract or tort."

This statute was struck down as unconstitutional and in violation of the Fourteenth Amendment to the United States Constitution in that the mere commission of a tort in a state injuring a resident without more minimum contacts is not sufficient. At page 420, the court characterizes the statute as follows:

> "Here, this defendant has no 'contacts, ties, or relations' in this state within the concept of the teachings of the International Shoe Co. case. Jurisdictional rights are of substance, and at least they deserve consideration from the viewpoint of fair play and substantial justice. The enactment of this statute is a classic example of an attempt by a State to eliminate by one fell swoop all such jurisdictional rights of a foreign corporation in a tort claim against it when damage has resulted to a Minnesota citizen. This assumes to obliterate all conditions precedent heretofore considered essential to the State's jurisdiction over a foreign corporation in a tort action. It seems evident that the enforcement of this statute under the circumstances herein cannot be sustained under the due process clause of the Federal Constitution."

Petitioner submits that this same characterization applies with full force to the judicial legislation of the Supreme Court of the State of California in their holding that the essential requirements are only that a

tort occurs in the State of California and that a California resident be injured.

—2. The history of the susceptibility of a foreign corporation to the jurisdiction of a state court is long, involved, and the subject of frequent decisions by the Supreme Court of the United States. This history may well be said to commence with *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed. 565. It would serve no substantial purpose in this petition for writ of certiorari to trace in detail the course of the development of the law regarding the right of a state to subject a foreign corporation to *in personam* jurisdiction except to note that the culmination of this phase of due process is to be found in *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95. The most recent decisions of the United States Supreme Court on the point are *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2nd 223, and *Hanson* v. *Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283.

The *Hanson* case is the most recent pronouncement by this court on the question of the right of a state court to subject a foreign entity, whether corporate or otherwise, to *in personam* jurisdiction of the state court. In the *Hanson* case Mr. Chief Justice Warren, at 357 U.S. 250, discussed the *McGee* case and at page 251 the case of *International Shoe Co.* v. *State of Washington* (*supra*) and in the course of that discussion relating to an asserted trend in the decisions as exemplified by *International Shoe* and *McGee* commented as follows:

> "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See

Vanderbilt v. *Vanderbilt*, 354 U.S. 416, 418, 77 S. Ct. 1360, 1362, 1 L. Ed. 2d 1456. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. See *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 319, 66 S. Ct. 154, 159, 90 L. Ed. 95."

In the *Cosper* case the California Supreme Court found, contrary to the findings of fact by the Judge of the Superior Court, that the activities of Walter Lookabaugh constituted the doing of business in the State of California by Smith & Wesson, Inc. In this regard Chief Justice Warren in the *Hanson* case commented at page 253 of the decision that:

"* * * the unilateral activity of those who claim some relationship with a non resident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 319, 66 S. Ct. 154, 156, 90 L. Ed. 95."

The decision of the majority in the *Hanson* case at page 254 holds that a forum state "does not acquire that jurisdiction by being the center of gravity of the controversy, or the most convenient location for litiga-

tion. The issue is personal jurisdiction, not choice of law."

These comments of the court in *Hanson* v. *Denckla*, *supra*, may be applied most emphatically to the action of the California Supreme Court in *Cosper* v. *Smith & Wesson, Inc.* Walter Lookabaugh was no more than an employee of an independent contractor, namely, Walter Lookabaugh, Inc., an independent corporation not connected in any way whatsoever with Smith & Wesson, Inc.

See: *Ludwig* v. *General Binding Corporation*, 21 F. R. D. 178.

The effect of the decision of the California Supreme Court in the *Cosper* case is to effectively erase and eliminate all effects whatsoever of state boundaries on the question of jurisdiction over foreign corporations and to whittle away the concept of the required contacts and connections in this state to sustain jurisdiction. The door is now open in California to practically unlimited juridiction over foreign corporations.

See: *Mueller* v. *Steelcase, Inc.*, 172 F. Supp. 416.

Judge Sobeloff of the Fourth Circuit Court of Appeals considered the question of the presence of a foreign corporation in the forum state in *Erlinger Mills* v. *Cohoes Fibre Mills*, 239 F. 2nd 502, and there held that the *International Shoe Co.* case would not authorize the State of North Carolina to assume jurisdiction for the purpose of rendering an *in personam* judgment over a New York corporation. In commenting upon the effect of the North Carolina statute decreeing that every foreign corporation is subject to suit in North Carolina where there is a reasonable expectation that

the goods produced by such foreign corporation are to be used and consumed in North Carolina, the court remarked as follows:

> "To illustrate the logical and not too improbable extension of the problem, let us consider the hesitancy a California dealer might feel if asked to sell a set of tires to a tourist with Pennsylvania license plates, knowing that he might be required to defend in the courts of Pennsylvania a suit for refund of the purchase price or for heavy damages in case of accident attributed to a defect in the tires. As in the hypothetical case, the sale in the principal case was 'with the reasonable expectation that these goods are to be used or consumed in (the vendee's domicile) and are so used and consumed.' It is difficult to conceive of a more serious threat and deterrent to the free flow of commerce between the states."

Judge Sobeloff's hypothetical situation is precisely the situation found in *Cosper* v. *Smith & Wesson, Inc.* The weapon about which complaint is made was manufactured in the State of Massachusetts.

3. The Supreme Court of the State of California in its interpretation of California Corporations Code Section 6500 distorts normal syntax in holding that service upon an employee of an independent contractor is service upon the "general manager within the state" of a foreign corporation, which, in fact, has no employees, agents, managers, or anyone over whom it exercises dominion or control within the state, and by this interpretation, likewise violates the due process clause of the United States Constitution.

Section 6500 of the California Corporations Code provides for service on foreign corporations in the part pertinent here as follows:

> "To the president or other head of the corporation, vice president, a secretary, an assistant secretary, the general manager in this state, or if the corporation be a bank to a cashier or assistant cashier."

In the instant action, it is conceded that there was no service on any of these designated people, but only a service upon Walter K. Lookabaugh. It is also established that Walter K. Lookabaugh is not an agent, servant, or employee of any kind or nature of Smith & Wesson, Inc., and the most that can be said of him is that he is an agent or employee of Walter Lookabaugh Company a corporation which has an independent contractual relationship with Smith & Wesson, Inc. To arrive at this conclusion, the Supreme Court of the State of California, of necessity, holds that the language "general manager in this state" means anyone who is in the opinion of the court sufficiently close to the foreign corporation that it appears likely that said foreign corporation will receive notice of the service. The determination of such an ephemeral matter would be one of degree, theoretically descending to the office boy or the janitor.

Section 6500 of the Corporations Code of the State of California as so interpreted is not in conformity with the interpretations of similar type statutes by the Federal Courts with regard to whether or not the test of due process has been made in the selection of the party to be served. *International Shoe Co. v. Washington* (*supra*), definitely required the presence in the state of agents of the foreign corporation even though their agency may be limited and restricted. They must be subject to direction and control through agency of the principal. In that case, at page 320, in discussing

the service and in upholding the service made in the State of Washington the court says, "We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's 'presence' there was not sufficient notice of suit." In that same case on both the issue of due process and the issue of service the existence of salesmen who were in fact agents in the state is compelling upon the court in arriving at its decision.

See: *Rock-Ola Manufacturing Corporation* v. *Wertz*, 249 F. 2nd 813.

Ludwig v. *General Binding Corporation*, 21 F. R. D. 178.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted.

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Certificate

I hereby certify that copies of this brief have been served on Morris B. Chain, Attorney for respondent Harold L. Cosper, this day of February 1960 by depositing the same in a United States mail box, air mail postage prepaid, to his post office address at 231 Sill Building, Bakersfield, California.

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